SELVARANI KV VELUSAMY

v.

SUNDARA RAJU KASAMOORTHIE

HIGH COURT MALAYA, SHAH ALAM
CHIN FOOK YEN J
[CIVIL APPEAL MT 4-11-32-98]
12 MAY 1999

CIVIL PROCEDURE: *Distress - Writ of distress - Setting aside - Grounds - Whether insufficient particulars in originating application for warrant of distress - Whether order granting warrant of distress proper - Whether affidavit-in-support defective - Whether there was breach of the tenancy agreement*

CIVIL PROCEDURE: *Affidavits - Affidavit-in-support affirmed before filing of originating application - Whether admissible - Whether affirmation of affidavit and filing of affidavit can be done at different dates - Whether affidavit can be affirmed but not filed before originating application*

LANDLORD AND TENANT: *Distress - Execution - Whether unlawful - Whether order of court granting warrant of distress must be served on appellant - Whether bailiff exceeded authority - Whether appellant should claim for damages instead*

The appellant was a tenant renting a certain portion of the premises ('the premises') of the respondent. The respondent obtained a writ of distress in the Sessions Court against the goods of the appellant to recover arrears in rent. This was an appeal by the appellant against the decision of the Sessions Court, disallowing an application to set aside the warrant of distress issued against her.

The appellant argued (1) that the originating application ('OA') for the issue of the writ of distress was bad in the absence of any particulars of the relief sought in the intitulement; (2) that there was a discrepancy in the order ('the order') made upon the OA; (3) that the affidavit-in-support was defective, being affirmed before the OA; (4) that there was a failure to disclose the existence of a superior tenancy between the respondent and the superior landlord of the premises concerned; (5) that the respondent had no authority to sub-let the premises concerned; and (6) that the writ of distress was wrongful and unlawful.

Held:

[1] There was no necessity to provide further particulars in the intitulement, as there was sufficient particulars to show that it was an *ex parte* originating application for distress.

[2] There was nothing wrong with the order given for the purpose. The order, apart from covering the bailiff with a legal shield, was necessary as part and parcel of the entire transaction to grant the bailiff the authority to enter and seize the goods on the premises.

[3] Affirmation of an affidavit and its filing may take place at different dates. There is no provision anywhere as to the earliest moment the applicant must file the affidavit. However, the affidavit may not be filed before the application concerned is filed, otherwise the affidavit when filed is intituled in a non-existing suit.

[3a] An affidavit can be affirmed at an earlier date and filed at a later date, depending on the dictates of necessity and situational factors. The affidavit-in-support in this instance was acceptable. Even though it was affirmed earlier, it was filed and dated the same day as the originating application was filed. Further, on the doctrine of relation back, the originating application upon filing at the registry would be related back to 00.01am and the affidavit-in-support filed later on the same day could be admitted, as, by then, there would have been a pending cause or matter.

[4] The appellant's objection that the respondent did not inform the appellant of the existence of a superior tenancy was vexatious and should be dismissed. This was because the tenancy agreement clearly and unmistakably disclosed the existence of such a tenancy.

[5] There was not an iota of evidence to show that the superior landlord had not given consent to the respondent to sub-let. On the contrary, there was evidence to show that he had sub-let five portions of the entire premises out to others, including the appellant and, there was no evidence of dispute between the respondent and the superior landlord.

[6] There was no requirement of law that the order must be served on the appellant. It was a process through which the writ of distress was issued, addressed to the bailiff for execution. The entire process was carried out *ex parte*.

[7] The writ of distress was not defective. The complaint was that in the process of execution, the authority was exceeded, resulting in an unlawful execution. The remedy, therefore, was by instituting or commencing an action for damages for wrongful distress. In order to succeed in damages, the applicant must prove the presence of malice.

[Appeal dismissed.]

Case(s) referred to:
Arab Malaysian v. Serajudin Mohd Ismail & Anor [1999] 6 CLJ 405 ***(not foll)***
Ban Hin Lee Bank Bhd v. Pang Lai Hin [1999] 2 MLJ 240 ***(refd)***
Cheow Chew Khoo v. Abdul Johari bin Abdul Rahman [1995] 4 CLJ 127 ***(dist)***
Chop Chye Hin Chong v. Ng Yeok Seng [1934] SSR (Vol III) 265 ***(refd)***
Francombe v. Francombe, 11 LT 757 ***(refd)***
H Stacey v. Diamond Metal Products Co Ltd & Anor [1935] MLJ 249 ***(refd)***
Kewangan Bersatu Bhd v. Metropolitan Property Holdings Sdn Bhd [1996] 1 MLJ 79 ***(foll)***
Kruhlak v. Kruhlak (No 2) [1958] 2 All ER 294 ***(refd)***
Seaford v. Selfert [1967] 2 All ER 458 ***(refd)***

Legislation referred to:
Distress Act 1951, ss. 5, (3), 14
Rules of the High Court 1980, O. 7 r. 2, O. 41 r. 9(2)
Subordinate Courts Rules 1980, O. 6 r. 8(1), O. 25 r. 30(2), O. 38 rr. 2(1), 3

Other source(s) referred to:
Annual Practice on Evidence

For the appellant - Amarjeet Singh; M/s Amarjeet & Co
For the respondent - S Many; M/s Satha & Co

Reported by Usha Thiagarajah

JUDGMENT

Chin Fook Yen J:

This is an appeal by the appellant/tenant from the decision of the Sessions Court in disallowing an application to set aside the warrant of distress issued against him.

The respondent/landlord, on 15 October 1997, applied to the court below pursuant to s. 5 of the Distress Act, 1951 (Act) under O. 38 of the Subordinate Courts Rules 1980 (SCR) for a warrant of distress against the goods of the appellant/tenant who was his tenant of a certain portion of the premises. The sessions judge issued the warrant and on 22 October 1997 goods of the appellant were seized under the warrant.

The appeal before me was argued on substantially six grounds:

(1) Absence of particulars of relief sought in the intitulement.

(2) Discrepancy between the Order of the court dated 17 October 1997 and the *ex parte* Originating Application (OA).

(3) The affidavit in support of the OA was defective, being affirmed before commencement of the distress proceedings.

(4) Non-disclosure of superior landlord.

(5) Breach of prohibition of sub-letting and

(6) Execution was wrongful due to non-service of the Order dated 17 October 1997.

Ground 1

Counsel for the appellant submitted that the *ex parte* OA, in the absence of any particulars of the relief sought in the intitulement, was bad and he cited the case *Cheow Chew Khoo v. Abdul Johari bin Abdul Rahman* [1995] 1 MLJ 457 in support. I am of opinion that the objection was untenable. In the first place, the case of *Cheow Chew Khoo* can be distinguished. There, it was an originating summons and not an *ex parte* originating summons. The distinction between them is obvious. In *ex parte* originating summons that part of the intitulement stating the statute or rule of court under which the court is being moved is omitted in Form 8 under O. 7 r. 2 of the Rules of the High Court 1980. In the instant case, O. 38 SCR relates specifically to distress proceedings and r. 2(1) thereof provides that such an application must be made *ex parte* by originating application to be supported by affidavit in Form 118. The OA filed herein is reproduced below.

DALAM MAHKAMAH MAJISTRET DI SHAH ALAM
DALAM NEGERI SELANGOR DARUL EHSAN

PERMOHONAN PEMULA DISTRES NO: 74-76-1997

ANTARA

SUNDARA RAJU A/L KASAMOORTHIE PLAINTIF

DAN

SELVARANI A/L K.V.VELUSAMY DEFENDAN

PERMOHONAN PEMULA DISTRESS
(EX-PARTE)

AMBIL PERHATIAN bahawa Plaintif yang dinamakan di atas bercadang untuk memohon kepada Mahkamah Sesyen di Shah Alam pada 17 haribulan 10 1997 pukul 9.00 pagi untuk perintah-perintah berikut:

(a) bahawa Writ Distress dikeluarkan terhadap harta barangan yang terletak dan dijumpai di dalam premis dikenali sebagai Tingkat Bawah (Bahagian Hadapan No. 11, Jalan USJ 11/3, 47600 Subang Jaya, Selangor Darul Ehsan (selepas ini dikenali sebagai "Premis tersebut") untuk mendapatkan bayaran berjumlah RM14,000.00 yang merupakan tunggakan sewa dari

1 haribulan July 1997 sehingga 1 haribulan Oktober 1997 (4 bulan) pada kadar RM3,500.00 sebulan yang kena dibayar dahulu pada 1 haribulan di dalam setiap bulan.

(b) Kes bagi permohonan dan kos bersamping dengannya sehingga perlaksanaan Writ Distress dibayar oleh pihak Defendan.

(c) Mengikut apa-apa keputusan atau pelepasan lain yang mana Mahkamah Mulia ini fikirkan perlu untuk bertindak.

BERTARIKH PADA HARIBULAN 15 OCT 1997

sgd
Pendaftar
Mahkamah Rendah
Shah Alam

The aforesaid OA was proper being in compliance with the very rule under which the court was being moved. There was no necessity to provide further particulars in the intitulement, as there was sufficient particulars to show that it was an *ex parte* originating application for distress. That apart, the body of the application also contained sufficient particulars. No way could it be mistaken for anything else.

Ground 2

As can be seen, the OA herein was for the issue of a warrant of distress and subsequently on 21 October 1997 the writ of distress was, in fact, issued in accordance with Form 120 under O. 38 r. 3 SCR. The objection taken by the counsel for the appellant was that the order dated 17 October 1997 made upon the OA was not authorised under s. 5 of the Act and moreover not one applied for. In that it ordered the "Bailif Mahkamah ini diberi kuasa untuk memasuki premis" concerned "untuk menahan harta alih yang dijumpai di dalam premis tersebut untuk mendapatkan kembali tunggakan sewa". I do not see anything wrong with the order given for the purpose. The order, apart from covering the Bailiff with a legal shield, was necessary as part and parcel of the entire transaction to grant the Bailiff the authority to enter and seize the goods on the premises. This ground must also fail.

Ground 3

It must be noted that the OA and the affidavit in support thereof were both dated the 15 October 1997 and from the Appeal Record provided both were received by the Court Registry at Shah Alam on the same day, ie, 15 October 1997. The same counsel argued that since the affidavit was affirmed at Klang, it must have been affirmed before the OA was filed subsequently at the Registry at Shah Alam. That being the case, the affidavit, being affirmed earlier to the filing of the OA, must be rendered inadmissible and in support thereof he cited

the case of *Arab Malaysian Fin Bhd v. Serajudin bin Mohd Ismail & Anor* [1999] 1 AMR 118. (See also a subsequent case of *Ban Hin Lee Bank Bhd v. Pang Lai Hin* [1999] 2 MLJ at p. 240).

In *Arab-Malaysian Fin Bhd* the originating summons (OS) was dated 28 August 1997 and the affidavit in support affirmed by the deponent was dated 21 August 1997. At p. 121, His Lordship held that "(t)herefore where as in this case an affidavit has been affirmed exactly one week before the OS was filed, surely the said affidavit cannot be said to have been affirmed in the cause or matter because properly speaking there was no cause or matter that had been registered at the Registry". The case of *Kewangan Bersatu Bhd v. Metropolitan Property Holdings Sdn Bhd* [1996] 1 MLJ 79 was also considered.

In the subsequent case of *Ban Hin Lee* the originating summons (OS) was filed on 24 June 1998 whereas the affidavit in support of the OS was affirmed on 22 June 1998. For the same reasons as stated in *Arab-Malaysian Fin Bhd* His Lordship dismissed the application holding that the affidavit, as such, supported a non-existent cause or matter. His Lordship seemed to equate affirmation with filing, if I read the two judgments correctly.

In *Kewangan Bersatu Bhd* the originating summons was dated 30 May 1994, whereas the affidavit was affirmed on 17 May 1994. His Lordship there decided that "an affirmation which precedes the filing of the affidavit, as occurred here, is perfectly in order". He explained that the deponent was resident at Petaling Jaya, Selangor and it would militate against common sense and convenience to require the deponent "to travel to Penang merely to affirm the affidavit on the same day on which the affidavit as well as the originating summons is filed, ie, 30 May 1994". Furthermore, after referring to O. 41 r. 9(2) of the Rules of the High Court 1980 (O. 25 r. 30(2) SCR is identical), he emphasised that an affidavit could well be affirmed at an earlier date and filed at a later date. With respect I agree with him in toto.

In both of these cases, *Kewangan Bersatu Bhd* and *Arab-Malaysian Fin Bhd*, the case of *H. Stacey v. Diamond Metal Products Co Ltd & Anor* [1935] MLJ 249 was considered. That case dealt with the admission of affidavit evidence. Somewhere towards the end of the judgment, at p. 250, the judge referred to the *Annual Practice on Evidence* citing *Francombe v. Francombe*, 11 LT 757 "in which it is pointed out that the court will not reject an affidavit which has been sworn before the proceedings were actually intituled provided that it is dated the same date". I took occasion to consider *Francombe*. That was a case of an application for injunction. The question there was, whether an injunction could be granted on an affidavit which had been filed the day before the bill was filed. The answer was in the negative. After having refused the injunction, the Lord Chancellor explained that "(a)n affidavit sworn on the

same day may be admitted in the order though actually sworn before the bill is filed". It would appear that an affidavit could be sworn earlier to its filing. In other words, the affirmation of an affidavit and its filing may take place at different dates.

The relevant facts in this issue have been stated earlier in the judgment and the relevant statutory provisions are as follows.

O. 38 r. 2(1) SCR reads:

> Every application for a writ of distress must be made *ex parte* by originating application supported by affidavit in Form 118.

O. 6 r. 8(1) SCR reads:

> Where the plaintiff intends to adduce evidence in support of an originating application at the hearing thereof he must do so by affidavit and, not less than 2 clear days before the hearing, serve a copy thereof on every defendant who has been served with the copy of the application.
>
> (2)
>
> Not less than 2 clear days before the day fixed for the hearing of an *ex parte* originating application the applicant must file an affidavit in support of the application.

It will be noted that sub-r 1 of r. 8 deals with the service of the affidavit, whereas, sub-r. 2 provides that the applicant must file the affidavit not less than two clear days before the day fixed for the hearing the OA. However, there is no provision anywhere to say as to the earliest moment the applicant must file the affidavit. Nevertheless, I share the view as expressed in the judgments referred to earlier that the affidavit may not be filed before the application concerned is filed, otherwise the affidavit, when filed, is in fact intituled in a non-existing suit. I think there can be no dispute about that. But, can an affirmation be done earlier than the filing of the application? Here, I think, O. 25 r. 30(2) SCR can resolve the problem and it reads:

> Every affidavit must be indorsed with a note showing on whose behalf it is filed and the dates of swearing and filing, and an affidavit which is not so indorsed may not be filed or used without the leave of the Court.

I am of opinion that an affidavit may be sworn at one moment and the filing of it at another moment, as His Lordship held in *Kewangan Bersatu Bhd* and I respectfully share the *ratio decidendi* therein when the judge, after referring to O. 41 r. 9(2) of the Rules of the High Court 1980 of which O. 25 r. 30(2) SCR is modelled, said at p. 83,

> This goes to show that the Rules Committee in drafting r. 9(2) with the reference to 'every affidavit' in the singular and to 'dates' in the plural envisaged that an affidavit could well be affirmed at an earlier date and filed at a later date, depending on the dictates of necessity and situational factors.

For the reasons above stated, I hold that the affidavit in support in the instant case is acceptable, even though it might be affirmed earlier, as it was filed and dated the same day as the OA was filed.

There is yet another reason why I hold that the affidavit concerned is still admissible. In the case of *Re Seaford* (deceased). *Seaford v. Selfert* [1967] 2 All ER 458, the plaintiff's solicitors' letter containing a notice of application for decree absolute posted to the registry was delivered at 8.30am on 6 July 1965 and at 10am the registrar filed the notice and after endorsement in the court minutes at that time, a certificate of decree absolute was issued. The same morning, the plaintiff's husband was found dead in bed. An application by the plaintiff, the deceased having died intestate, for a grant of letters of administration of his estate was opposed by the deceased's mother on the ground that she was the only person entitled to the estate, the marriage having been dissolved before the deceased died. The trial judge found as a fact that the deceased died between 9pm on 5 July 1965, and 4am on 6 July 1965 and held on a very slender balance of probabilities that the deceased died after mid-night. The plaintiff was not entitled to letters of administration, because, *inter alia*, the lodgment of the application for decree absolute and its filing were to be treated as a single transaction, the filing being a judicial act, and the transaction could not be split into a non-judicial part, the application, and a judicial part, the filing: accordingly the doctrine of the relation back of a judicial act to the beginning of the day on which it was done (not, in this instance, to the time when the application was delivered at the court office) applied, and the registrar had jurisdiction to file the application on that day and by so doing made the decree absolute with effect from the beginning of that day. The trial judge held that "(t)here is an ancient rule of law that a judicial act generally relates back to the beginning of the day on which it was performed". This proposition of law, however, the trial judge also derived support from the case of *Kruhlak v. Kruhlak (No. 2)*, [1958] 2 All ER 294, an appeal case to the Divisional Court of the Queen's Bench Division where Diplock J (as he then was) gave the first judgment of which Lord Goddard, CJ, and Cassels, J, agreed without anything further to add. In that case, a married woman separated from her husband gave birth to an illegitimate child at 7.30 am. At 10 am the same day a decree nisi of divorce dissolving her marriage was made absolute. It was held that the decree absolute, being a judicial act, dated from the earliest time of the day on which it was made, and the child was accordingly legitimated under the relevant legislation.

To return to our case, on the doctrine of relation back, the OA upon filing at the Registry would be related back to 00.01am, and the affidavit in support filed later on the same day could be admitted, as, by then, there would have been pending a cause or matter. For this reason again, the objection must also fail.

Grounds 4 & 5

I propose to take grounds 4 and 5 together for consideration. Under ground 4, counsel for the appellant submitted that the respondent/landlord did not inform the appellant/tenant of the existence of a superior tenancy between the respondent and the superior landlord of the premises concerned. For whatever reason it was worth, on the facts on the case, as disclosed by the documents in the Appeal Record provided, this ground must be dismissed. The preamble under (a) to the tenancy agreement dated 11 September 1996 between the parties herein clearly and unmistakably disclosed that "(O)n the 11 April 1996 the Tenant (the respondent) had entered into an agreement with the Landlord (superior landlord) for a tenancy of the" premises concerned. For this reason alone, the court feels that the objection was vexatious and should be dismissed.

In ground 5, the contention of the appellant was that the respondent had no authority to sub-let the premises concerned and therefore, the sub-letting was illegal. To this extent the appellant had sent a letter dated 29 September 1997 to the superior landlord trying to put words into the latter's mouth so as to make a case for the appellant. Whatever was stated therein, one thing is clear and that is there was not an iota of evidence to show that the superior landlord had not given consent to the respondent to sub-let. On the contrary, the respondent had in his affidavit dated 29 October 1997 disclosed that he had sub-let five (5) portions of the entire premises out to others, including the appellant and, if I may add, so far no evidence of dispute between the respondent and the superior landlord. The court has also noticed that under cl. 2(g) of the superior tenancy agreement, the superior landlord must not unreasonably withheld consent, where the request for sub-letting is not detrimental to the superior landlord. On the facts of the case, both the grounds must fail.

Ground 6

In his submission counsel raised three aspects of the execution of the writ of distress wrongful and unlawful. Firstly, he contended that there was no service of the order dated 17 October 1997 on the appellant. The short answer to it is that there is no requirement of law that such an order has to be served on the appellant. It was a process through which the writ of distress was issued, which was addressed to the Bailiff for execution. The entire process was carried out *ex parte*. In my opinion, the element of surprise is expected, because if the order was made known, the execution might not be fruitful, bearing in mind that under s. 5(3) of the Act arrears of rent might be distrained for only in respect of goods of the tenant that were still on the premises. Such an intention is clear when s. 14 of the Act is considered. Here, when the rent of the immediate tenant of such superior landlord is in arrears, it shall be lawful for the superior landlord to serve upon any under tenant a notice stating

the amount of such arrears of rent, etc. There is a requirement of law here to effect service on the under tenant, but not the appellant here, as the tenant. The other two aspects of the objection dealt with the seizure of exempted goods and the allegation that the premises were locked up in the course of the execution, thus preventing the right of entry. Such acts, if proven, are unlawful and the court certainly cannot condone them. However, they are not basis for setting aside the writ of distress unless the writ itself was defective and that is not the case here. The complaint here is that in the process of execution the authority had been exceeded resulting in an unlawful execution. Inasmuch as the writ was concerned there was nothing unlawful. I am of opinion the remedy is by instituting or commencing an action for damages for wrongful distress. It has been held in the case of *Chop Chye Hin Chong v. Ng Yeok Seng* [1934] SSR (Vol. III.) 265, before the Supreme Court Appellate Civil Jurisdiction, at p. 266:

> The procedure for effecting a distress for rent in this Colony is entirely different from that which prevails in England.
>
> In England a landlord has the right to seize the goods of his tenant on the demised premises for rent in arrear and does so without the intervention of the Court. Here he has no such right but has to proceed under Chapter XXXIII of the Civil Procedure Code and obtain an order for the issue of a warrant of distress which is directed to the Sheriff for execution.
>
> It is a well established principle both with regard to civil and criminal matters that a person is not liable in damages for putting the law in motion unless he is actuated by malice. It is the right of everyone to put the law in motion if he does so with the honest intention of protecting his interests but it is an abuse of that right if he proceeds maliciously and without reasonable and probable cause for anticipating success. An example of this will be found in the difference that exists between an action for wrongful arrest and one for malicious prosecution. In the case of the first, where a man acts on his own initiative, proof of malice is not necessary to give a right to recompense by damages. In the case of the second, where the interposition of the Court is obtained, malice must be established.

It is certainly the state of the law that in order to succeed in damages, the applicant must prove the presence of malice, as the Chief Justice in *Chop Chye Hin Chong* held "the reason being, as stated in the latter case, that there is a judicial determination interposed between the filing of the affidavit on which the writ is issued and the issue of the writ, and the issue of the writ is in consequence of that interposition and therefore persons acting without malice are protected".

For the reasons above stated, the appeal is dismissed with costs.